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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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NOS. 09-14-00452-CR; 09-14-00453-CR

ON APPEAL FROM THE COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS AT BEAUMONT

JEROMY JOHN LEAX, *Appellant,*

v.

THE STATE OF TEXAS, *Appellee.*

Arising from:

Cause No. 13-11-11867-CR
IN THE 221ST DISTRICT COURT,
MONTGOMERY COUNTY, TEXAS

STATE'S APPELLATE BRIEF

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IDENTITY OF PARTIES AND COUNSEL

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STATEMENT OF THE CASE

The appellant was charged with two counts of online solicitation of a minor under the former Tex. Penal Code Ann. § 33.021(c)[1] (C.R. Count II at 18). The trial

[1] Section 33.021 was amended during the 84th Legislature. *See* Act of May 22, 2015, 84th Leg., ch. 61 (S.B. 344), §§ 1-2, eff. Sept. 1, 2015. The amendments do not apply to the appellant's case, and the present challenge attacks the previous version of the statute:

> (a) In this section:
>
> (1) "Minor" means:
>
> (A) an individual who represents himself or herself to be younger than 17 years of age; or
>
> (B) an individual whom the actor believes to be younger than 17 years of age.
>
> * * *
>
> (c) A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.
>
> (d) It is not a defense to prosecution under Subsection (c) that:
>
> (1) the meeting did not occur;
>
> (2) the actor did not intend for the meeting to occur; or
>
> (3) the actor was engaged in a fantasy at the time of commission of the offense.

See Act of April 12, 2005, 79th Leg., ch. 1273, § 1, eff. June 18, 2005.

court granted the State's motion to amend the indictment, but denied the appellant's amended motion to quash the indictment. The appellant entered a plea of guilty to both counts of the amended indictment, and the trial court assessed his punishment at imprisonment for thirteen years in each count (C.R. Count II at 87).

The Ninth Court of Appeals affirmed the appellant's conviction on April 13, 2016. This Court granted the appellant's petition for discretionary review.

STATEMENT OF FACTS

The facts of this case are not relevant because the appellant presents a facial challenge to the validity of the prior online-solicitation-of-a-minor statute.

SUMMARY OF THE STATE'S ARGUMENT

The appellant lacks standing to present a facial challenge to the statute because the amendments to the statute have eliminated any alleged chilling effect on protected expression. The Ninth Court of Appeals correctly concluded that the statute restricted conduct and did not violate the First Amendment. Alternatively, as a restriction on expression, the statute is not substantially overbroad and satisfies strict scrutiny. Finally, even if the statute is unconstitutional, this Court should adopt a limiting construction rather than declare the entire statute void.

ARGUMENT

I. The appellant lacks standing to assert a facial challenge to the validity of the statute.

The Supreme Court has long permitted a litigant whose conduct may be otherwise lawfully proscribed to present a facial challenge to the validity of a statute. This exception to traditional concepts of standing exists for precisely one reason: "the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984); *see also Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). The Supreme Court has cautioned that, when challenged by a defendant who cannot claim the law is unconstitutional as applied to his own conduct, declaring a statute overbroad is "strong medicine" to be employed only as a last resort:

> What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by "weighty countervailing policies." The doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity.
>
> The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort."

New York v. Ferber, 458 U.S. 747, 768–69 (1982) (internal citations omitted).

The origins of the standing exception can be traced to the Supreme Court's opinion in *Thornhill v. Alabama*, prior to which a litigant was required to show that the invalidity of the statute extended to his own conduct:[2]

> A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its

[2] *Taxpayers for Vincent*, 466 U.S. at 798.

> purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship.

Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940) (internal citations omitted). In subsequently clarifying the limits of this exception, the Supreme Court explained that a litigant seeking to exploit the exception must establish a present or future danger of restriction on freedom:

> This 'exception to the usual rules governing standing,' reflects the transcendent value to all society of constitutionally protected expression. We give a defendant standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute, because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.'
>
> Of course, in order to have standing, an individual must present more than 'allegations of a subjective 'chill'. There must be a 'claim of specific present objective harm or a threat of specific future harm.'

Bigelow v. Virginia, 421 U.S. 809, 816–17 (1975) (internal citations omitted). In *Bigelow*, the appellant's own conduct was protected by the First Amendment, and the Supreme Court held that Virginia could not lawfully apply the statute in question to the defendant's conduct. Significantly however, the statute at issue had been amended, and there was no risk of future application or that the statute would "chill the rights of others." *Id.* at 817. As a result, the Court expressly declined to consider the defendant's overbreadth claim. *Id.*

In this case, the appellant complains that the definition of "minor" in subsection (a)(1) and the provisions negating certain defenses in subsection (d) render the statute facially invalid. The legislature remedied each of the alleged defects on September 1, 2015, when it amended the definition of minor and eliminated the complained of portions of subsection (d). *Compare* Act of April 12, 2005, 79th Leg., ch. 1273, § 1, eff. June 18, 2005, *with* Tex. Penal Code Ann. § 33.021 (West Supp. 2016).

The societal detriment resulting from an overbroad statute traditionally justifies permitting even a defendant whose conduct could be lawfully prohibited to litigate the validity of a statute solely to prevent the prospective "chilling" effect it may have on the constitutionally-protected conduct of others. But once a statute has been amended to eliminate any claimed overbreadth, the need to prevent the chilling effect on social discourse no longer exists. A defendant prosecuted for constitutionally-protected conduct may continue to assert the protected nature of his actions in an as-applied challenge to the statute. But by retroactively invalidating a statute no longer in effect, no chilling effect is prevented. The Court would grant a windfall to a defendant whose conduct may be lawfully proscribed and penalize the State for past legislative errors—a dose of "strong medicine" even the Supreme Court declined to administer. *See Bigelow*, 421 U.S. at 817. Because the appellant lacks standing in a traditional sense and fails to meet the exception

permitting his present challenge, this Court should hold that the appellant lacks standing to challenge the validity of the prior online solicitation statute.

II. Statutes regulating conduct are subject to less rigorous review than statutes regulating speech.

The Supreme Court previously recognized that when considering the alleged overbreadth of a statute regulating conduct, compared to a statute regulating "pure speech," the Constitution permits a greater infringement on otherwise-protected conduct:

> But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Broadrick, 413 U.S. at 615 (internal citations omitted). The Court in *Broadrick* determined that the statute in issue was constitutional, despite its prohibition on soliciting on behalf of political candidates, managing political operations, or even joining political parties. *See id*. at 617. Although the Court in *Broadrick* did not

identify a separate level of scrutiny for conduct-based offenses, it does appear to be the origin of the requirement that a facial challenge requires *substantial* overbreadth "judged in relation to the statute's plainly legitimate sweep" before the statute will be declared unconstitutional. *Id.* at 615. As the appellant suggests, the Supreme Court subsequently adopted this substantial overbreadth analysis to a statute regulating "traditional forms of expression such as books and film" (br. at 16). *See Ferber*, 458 U.S. at 771. In *Ferber*, the Supreme Court noted that the lower court recognized the disparate treatment for conduct-related statutes, but ultimately concluded that there was no "appreciable difference" between the statute at issue and the statute in *Broadrick*; applied the concept of substantial overbreadth to the speech restriction at issue; and noted the Court's historical pattern of applying the principle in the context of speech:

> *Broadrick* examined a regulation involving restrictions on political campaign activity, an area not considered "pure speech," and thus it was unnecessary to consider the proper overbreadth test when a law arguably reaches traditional forms of expression such as books and films. As we intimated in *Broadrick*, the requirement of substantial overbreadth extended "at the very least" to cases involving conduct plus speech. This case, which poses the question squarely, convinces us that the rationale of *Broadrick* is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution.
>
> The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel. On most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression.

Id.

At least in the context of as-applied challenges, however, the Supreme Court continued to treat conduct-focused statutes differently from those regulating speech. The Court acknowledged that "government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406 (1989). The Court explained that conduct-focused offenses are subject only to intermediate scrutiny if the governmental interest is "unrelated to the suppression of expression." *Id.* at 407 (citing *United States v. O'Brien*, 391 U.S. 367, 375 (1968)); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (acknowledging that intermediate scrutiny is appropriate when reviewing the constitutionality of conduct-based statutes).

The Supreme Court also treats conduct-focused statutes differently by placing the burden to demonstrate substantial overbreadth on the claimant. *Compare Hicks*, 539 U.S. at 122 ("The overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists."), *with United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000) ("When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed.").

III. The Ninth Court of Appeals correctly concluded that the statute restricts conduct.

In evaluating the constitutionality of subsection (b), this Court acknowledged that for the provision in issue it is "the *conduct* of requesting a minor to engage in illegal sexual acts that is the gravamen of the offense." *Ex parte Lo*, 424 S.W.3d 10, 17 (Tex. Crim. App. 2013). Every court of appeals to address the constitutionality of subsection (c) has likewise concluded that it is a restriction on conduct. *See, e.g., Mower v. State*, No. 03-14-00094-CR, 2016 WL 1426517, at *3 (Tex. App.—Austin Apr. 7, 2016, no pet.) (mem. op., not designated for publication); *State v. Paquette*, 487 S.W.3d 286 (Tex. App.—Beaumont 2016, no pet.); *Ex parte Fisher*, 481 S.W.3d 414 (Tex. App.—Amarillo 2015, pet. ref'd); *Collins v. State*, 479 S.W.3d 533 (Tex. App.—Eastland 2015, no. pet.); *Ex parte Wheeler*, 478 S.W.3d 89 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd); *Ex parte Zavala*, 421 S.W.3d 227, 232 (Tex. App.—San Antonio 2013, pet. ref'd). As a restriction on conduct, the appellant bears the burden to prove the statute is substantially overbroad.

IV. The statute does not violate the First Amendment.

A. Even if considered a restriction on speech, the statute proscribes conduct within a historically-recognized exception to the First Amendment.

In the alternative, if this Court decides that subsections (c) and (d) operate as a content-based restriction on expression, then the statute is nevertheless

constitutional because it primarily restricts expression that falls within a historically-recognized category of unprotected speech, it does not restrict a substantial amount of unprotected speech, and it satisfies strict scrutiny. *See United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (identifying the categories of unprotected speech as "advocacy intended, and likely, to incite imminent lawless action"—hereafter referred to as inciting speech—obscenity, defamation, speech integral to criminal conduct, "fighting words," child pornography, fraud, true threats, and "speech presenting some grave and imminent threat the government has the power to prevent"). Additionally, "offers to engage in illegal transactions"—hereafter referred to as soliciting speech—"are categorically excluded from First Amendment protection." *United States v. Williams*, 553 U.S. 285, 297 (2008).

For purposes of review of this statute, the relevant categories of unprotected speech are inciting speech and soliciting speech.

1. Inciting speech.

"Advocacy intended, and likely, to incite imminent lawless action" is not protected speech. This is a narrowly drawn category. In *Brandenburg v. Ohio*, the Supreme Court struck down a statutory prohibition on advocating or assembling to advocate the use of criminal acts as a "means of accomplishing industrial or political reform." *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969). The Court was

careful to distinguish between general advocacy or teaching, which are constitutionally protected and improperly restricted by the Ohio statute in issue, and unprotected speech that was intended to incite imminent lawless action. *Id.* at 448-49.

The statute in issue prohibited soliciting a minor for sexual contact, sexual intercourse, or deviate sexual intercourse, which will, in many cases, be speech intended and likely to incite imminent lawless action. Because that form of speech is outside the protection of the First Amendment, a statute cannot be held unconstitutional for regulating or prohibiting it.

2. Soliciting speech.

Soliciting speech requires no imminence and no likelihood of success, but only that the person offer to give or receive something that is lawfully proscribed. *See Williams*, 553 U.S. at 298.

Unquestionably, engaging in sexual contact, sexual intercourse, or deviate sexual intercourse with a child younger than seventeen is conduct that may be lawfully proscribed. Therefore, speech that solicits a child to engage in proscribed sexual acts, which is for all intents and purposes an offer to engage in sex, falls within a historically-recognized category of unprotected speech, and may lawfully be criminalized without violating the First Amendment. *See id.*

B. The statute is not substantially overbroad.

A statute prohibiting otherwise-unprotected speech may nevertheless run afoul of the First Amendment if the statute also proscribes substantial legitimate or protected speech:

> According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.

Williams, 553 U.S. at 292 (internal citations omitted); *see also Ferber*, 458 U.S. at 770 ("We have, in consequence, insisted that the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face.").

In *Williams*, the Supreme Court upheld the federal prohibition on the promotion or solicitation of child pornography. The Court acknowledged that the statute criminalized the conduct of "an Internet user who solicits child pornography from an undercover agent" or "a person who advertises virtual child pornography as depicting actual children," even where no actual child pornography exists. *Williams*, 553 U.S. at 293. The Court additionally addressed the possibility that "the statute could ensnare a person who mistakenly believes that material is child

pornography," concluding that such a mistake made no difference in whether the speech was protected by the First Amendment. *Id.* at 300. Finally, even though the statute likely prohibited some protected speech, and an as-applied challenge may be appropriate in certain instances, the statute was nevertheless constitutional because it was not "*substantially* overbroad." *Id.* at 302-03.

Similarly, in *Ferber*, the Supreme Court acknowledged that a New York statute prohibiting child pornography potentially encompassed "some protected expression, ranging from medical textbooks to pictorials in the National Geographic." *Ferber*, 458 U.S. at 773. Assuming that the protected speech amounted to only a "tiny fraction of the materials within the statute's reach," the Court upheld the statute and acknowledged that a case-by-case analysis of whether the speech was protected would be appropriate in dealing with those cases. *Id.* at 773-74.

The statute in issue prohibited the solicitation of minor, which can be a person whom the actor believes to be an actual child or a person who represents himself to be a child. *See* Tex. Penal Code Ann. § 33.021(a). The solicitation must ask the minor to meet with the intent that the minor engaged in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person. *See* Tex. Penal Code Ann. § 33.021(c). It is not a defense that the meeting did not occur, the actor did not intend for the meeting to occur, or the actor is engaged in a

fantasy at the time of the solicitation. *See* Tex. Penal Code Ann. § 33.021(d). As a result, the statute prohibits three scenarios involving solicitation of a minor: (1) a defendant who solicits an actual child, (2) a defendant who solicits someone who is not a child, but who the defendant does not know to be an adult, and (3) a defendant who solicits someone who is not a child, and whom the defendant actually knows to be an adult.

The first scenario is unprotected expression. *See Williams*, 553 U.S. at 297 ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection"); *United States v. Howard*, 766 F.3d 414, 430 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1015 (2015); *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) ("Speech attempting to arrange the sexual abuse of children is no more constitutionally protected than speech attempting to arrange any other type of crime.").

The second scenario is also unprotected expression. When viewed specifically from the perspective of the defendant at the time of the solicitation, this scenario is indistinguishable from the first. In *Williams*, the Court upheld a statute imposing criminal liability, *inter alia*, on "an Internet user who solicits child pornography from an undercover agent . . . even if the officer possesses no child pornography," and pointed out that "offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the

offeror is mistaken about the factual predicate of his offer." *Williams*, 553 U.S. at 293, 300.

The third scenario is likely protected expression because there is no offer to engage in illegal conduct, and there is no risk that it will incite imminent illegal conduct. But the statute should be overturned in a facial challenge only if it is *substantially* overbroad. *See Williams*, 553 U.S. at 292-93. The reach of this third category, when compared with the legitimate sweep of the statute, is not substantial. *See Maloney v. State*, 294 S.W.3d 613, 628 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) ("Considering the overly broad scope and purpose of section 33.021, we have been given no basis to believe that prosecutions of consenting adults engaging in role-playing would amount to any more than a 'tiny fraction' of all prosecutions under the statute"). In an effort to show that the reach of this third category is substantial, the appellant presented to the trial court a report written by Paul J. Dohearty regarding the pastime of "age play," which is explained as "roleplaying by consenting adults in which they take on different age related roles" (C.R. Count II at 107-120). This evidence, though likely the best evidence available, falls far short of establishing that the statute affects a substantial amount of protected speech. Even if the evidence is taken at face value, it establishes only that a small portion of the population has any interest or

curiosity in age play, estimated to be approximately 95,000 people worldwide,[3] based on a user survey conducted at fetlife.com (C.R. Count II at 117-118). Logically, an even smaller portion of the population with any interest actually puts forth the effort to engage in age play on the internet. The missing link in the data provided, and the most crucial one, is the number of individuals who, while engaged in age play in an electronic medium *with someone the actor knows is not a child*, transition from online role-playing or "dirty talk"—which does not fall within the scope of subsection (c)—to the proscribed solicitation to meet for sex. And even then it is only if the solicitation is made to the adult pretending to be the minor, not the other way around.

When this relatively-unusual occurrence is balanced with the State's legitimate prevention of the use of the internet to lure children into becoming victims of sexual abuse, there is no basis to conclude that the age play scenario constitutes a substantial amount of protected speech or that it could not be dealt with on a case-by-case basis. *See Ferber*, 458 U.S. at 773. Therefore, this Court

[3] A United Nations report issued May 5, 2014, estimated that almost 3 billion people would have internet access by the end of 2014. *See* http://www.itu.int/net/pressoffice/press_releases/2014/23.aspx#.U2gOyvldXIM. Therefore, 95,000 people would constitute approximately .0032% of internet users. Even the author's admittedly-unsubstantiated estimate of nearly 1.9 million people "who have more than a passing interest" is a mere .063% of internet users worldwide (C.R. Count II at 118).

should find that section 33.021 is not substantially overbroad in violation of the First Amendment.

C. The online-solicitation-of-a-minor statute satisfies strict scrutiny.

"To satisfy strict scrutiny, a law that regulates speech must be (1) necessary to serve a (2) compelling state interest and (3) narrowly drawn. A law is narrowly drawn if it employs the least restrictive means to achieve its goal and if there is a close nexus between the government's compelling interest and the restriction." *Lo*, 424 S.W.3d at 15.

Section 33.021 unquestionably serves a compelling state interest in protecting children from sexual abuse. *Id.* at 20-21. Section 33.021 is also narrowly drawn. The statute encompasses solicitation intended to lure a child for the purposes of sexual abuse. Requiring that the conduct be directed at a child, rather than simply a person who represents himself to be a child, would unnecessarily tie the hands of law enforcement to prevent this type of offense before a child is endangered.

V. Even if the statute is unconstitutionally overbroad, this Court need not strike down the entire statute.

Where a statute is facially overbroad and violates the First Amendment because it prohibits a substantial amount of protected speech, courts may adopt a limiting construction or invalidate only a portion of the statute. *Hicks*, 539 U.S. at

119. Striking down an entire statute should be used only as a last resort. *See Broadrick*, 413 U.S. at 613 ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."). In *Lo*, this Court faced an incurable statute that, due to other existing laws, served to almost exclusively criminalize protected speech. *Lo*, 424 S.W.3d at 20 ("The only material that this subsection covers that is not already covered by another penal statute is otherwise constitutionally protected speech."). No limiting construction of that statute could have saved it, nor was there any reason to do so—virtually no punishable conduct would be rendered unpunishable as a result of striking down section 33.021(b).

If this Court concludes that, as written, the statute is unconstitutional—either because it encompasses substantial protected speech, or because it is subject to but fails to satisfy strict scrutiny—the proper solution is to eliminate the definition of minor as "an individual who represents himself or herself to be younger than 17 years of age." *See* Tex. Penal Code Ann. § 33.021(a)(1)(A). Elimination of this definition would limit the application of the statute to the unprotected categories above because it would then require proof that the defendant believed he was soliciting a child, ensuring that speech such as age play between adults is no longer encompassed by the statute. And unlike *Lo*, striking down the entirety of section 33.021(c) would render substantial punishable speech unpunishable.

For the foregoing reasons, this Court should overrule the appellant's point of error, or alternatively, find that the statute prohibits both unprotected speech and a substantial amount of protected speech and adopt a limiting construction that excludes the protected speech but leaves intact the proscription on unprotected speech.

CONCLUSION AND PRAYER

It is respectfully submitted that all things are regular and the judgment of the court of appeals should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this document complies with the requirements of Tex. R. App. P. 9.4(i)(2)(B) because there are 4,435 words in this document, excluding the portions of the document excepted from the word count under Rule 9.4(i)(1), as calculated by the Microsoft Word computer program used to prepare it.

/s/ Jason Larman
JASON LARMAN
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served via efile.txcourts.gov to Mr. Mark Bennett, counsel for the appellant, at eservice@ivi3.com on the date of the submission of the original to the Clerk of this Court.

/s/ Jason Larman
JASON LARMAN
Assistant District Attorney
Montgomery County, Texas